

SOUTHERN ENVIRONMENTAL LAW CENTER

Telephone 615-921-9470

1033 DEMONBREUN STREET, SUITE 205
NASHVILLE, TN 37203

Facsimile 615-921-8011

April 30, 2019

VIA FOIAonline (foiaonline.regulations.gov)

National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460

Re: Freedom of Information Act Request: Communications between power companies and the Environmental Protection Agency regarding the federal Coal Combustion Residuals Rule's location restriction provisions

To the FOIA Officer:

Under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as amended, the Southern Environmental Law Center ("SELC") requests the following documents relating to the federal Coal Combustion Residuals Rule, 40 C.F.R. §§ 257.50-107 ("CCR Rule"):

1. From October 19, 2015, to the date upon which this request is processed, all documents and data, including email correspondence, exchanged between the Environmental Protection Agency ("EPA") and Gavin Power, LLC or EPA and South Carolina Electric & Gas regarding the location restriction demonstrations sections of the CCR Rule, 40 C.F.R. §§ 257.60-64; and
2. From October 19, 2015, to the date upon which this request is processed, all documents and data, including email correspondence, exchanged between EPA and Gavin Power, LLC or EPA and South Carolina Electric & Gas regarding the recordkeeping, notification, and internet posting sections of the CCR Rule, 40 C.F.R. §§ 257.105-107.

For the purposes of this request, the term "documents" includes all written, printed, recorded or electronic: materials, communications, correspondence, emails, memoranda, notations, copies, diagrams, charts, maps, photographs, tables, spreadsheets, formulas, directives, observations, impressions, contracts, letters, messages and mail in the possession or control of the Environmental Protection Agency or its agents.

An earlier version of this request was submitted on March 4, 2019: EPA-HQ-2019-003945. This request was incorrectly characterized as a duplicate request with EPA-R4-2019-003946, which requested information about communications between EPA Region 4 and South Carolina Electric & Gas regarding the CCR Rule, and was then closed. These requests were not duplicates. This request (and the earlier, closed, version EPA-HQ-2019-003945) seeks records from EPA HQ, not Region 4. It also seeks information on communications between EPA and Gavin Power, not just between EPA and South Carolina Electric & Gas. It should therefore be processed independently.

These records are likely to be found in the custody of the Office of Enforcement and Compliance Assurance or the Office of Land and Emergency Management. To further facilitate finding these records, a list of the facilities associated with these utilities has been compiled. Links in the footnotes lead to the facility page on EPA's Facility Registry Service. This list is not meant to be exclusive, or to limit the above request in any way.

American Electric Power Gavin Plant (EPA Registry Id: 110043788327)¹
SCE&G Wateree Station (EPA Registry Id: 110015337198)²

Fee Waiver Request

SELC is requesting copies (electronic, if possible) without charge, or at a reduced charge, because reduction or waiver of fees would be in the public interest. A disclosure is in the public interest if: (1) it is likely to contribute significantly to public understanding of the operations or activities of the government, and (2) it is not primarily in the commercial interest of the requester. The public interest standard of the fee waiver provision of the FOIA should be "liberally construed" in favor of waivers. *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987); *Pederson v. Resolution Trust Corp.*, 847 F. Supp. 851, 855 (D. Colo. 1994); *Etlinger v. FBI*, 596 F. Supp. 867, 872 (D. Mass. 1984). The goal of the statute is to avoid the "roadblocks and technicalities which have been used by various Federal agencies to deny waivers..." *Pederson*, 847 F. Supp. at 855.

In determining whether the first prong of the public interest test is met, four factors are considered. First, "[t]he subject of the requested records must concern identifiable operations or activities of the Federal government, with a connection that is direct and clear, not remote." 40 C.F.R. § 2.107(l)(2)(i). The requested records concern the communications between EPA and electric power companies regarding provisions of the CCR Rule, a federal regulation. The subject of the requested records clearly and directly concerns operations or activities of the federal government.

Second, the information contained in the records must be "'likely to contribute' to an understanding of government operations or activities," which is judged by whether the records will "be meaningfully informative about government operations or activities." 40 C.F.R. § 2.107(l)(2)(ii). The requested records contain information about how EPA understands the CCR Rule's provisions in relation to federally regulated power plants. The communications between a federal agency and regulated entities regarding their understanding of a recently promulgated regulation is meaningfully informative of government operations.

Third, the requested information "must contribute to the understanding of a reasonably broad audience of persons interested in the subject." 40 C.F.R. § 2.107(l)(2)(iii). For this factor, "[a] requester's expertise in the subject area and ability and intention to effectively convey information to the public will be considered." *Id.* SELC is a 501(c)(3) non-profit organization

¹ https://ofmpub.epa.gov/enviro/fii_query_detail.disp_program_facility?p_registry_id=110043788327.

² https://ofmpub.epa.gov/enviro/fii_query_detail.disp_program_facility?p_registry_id=110015337198.

with over thirty years of experience disseminating public information regarding the regulatory and operations issues of power companies. SELC maintains a website that includes both general and topic-specific information regarding the matters with which SELC is involved, including matters related to the CCR Rule and coal ash contamination.³ Lawyers at SELC are interviewed by or otherwise provide information to the media to explain their work related to coal ash and its significance.⁴ SELC's website contains documents generated by SELC for the specific purpose of educating the public on particular issues. SELC speaks at community meetings on particular topics, including regulatory compliance with the CCR Rule. SELC also assists the public in locating information relating to particular topics by collecting and posting relevant information, documents, and links to other websites.⁵ A broad audience of persons is interested in the subject of EPA's understanding of the CCR Rule, and SELC is well-positioned to effectively convey this information to the public.

The last factor for the first determination is "[w]hether the disclosure is likely to contribute 'significantly' to public understanding." 40 C.F.R. § 2.107(l)(2)(iv). Because the CCR Rule was promulgated relatively recently, and has been the subject of legal disputes, any communications between EPA and regulated entities regarding their potential obligations will significantly contribute to citizen understanding of the current regulatory situation. As set forth above, SELC plays a critical role in informing the public regarding coal ash management practices and compliance concerns.

The second consideration in whether a fee waiver is in the public interest is whether the request is primarily in the commercial interest of the requester. 40 C.F.R. § 2.107(l)(2)(i). Two factors are evaluated for this determination. The first factor is "[t]he existence and magnitude of a commercial interest." 40 C.F.R. § 2.107(l)(3)(i). Commercial interest is evaluated per the

³ See, e.g., <https://www.southernenvironment.org/news-and-press/press-releases/north-carolina-orders-duke-energy-to-clean-up-its-coal-ash-pollution> (April 2019); <https://www.southernenvironment.org/news-and-press/news-feed/shelby-county-puts-strict-limits-on-tvas-wells> (February 2019); <https://www.southernenvironment.org/news-and-press/press-releases/coal-ash-cleanup-victory-in-virginia> (February 2019); <https://www.southernenvironment.org/news-and-press/press-releases/selc-monitoring-sutton-coal-ash-release-in-wake-of-hurricane-florence> (September 2018); <https://www.southernenvironment.org/news-and-press/news-feed/selc-partners-push-for-better-protection-of-memphis-sand-aquifer-at-county> (March 2018); <https://www.southernenvironment.org/news-and-press/press-releases/after-groups-legal-action-duke-energy-releases-dam-safety-information-for-n> (October 2017).

⁴ See, e.g., https://www.greensboro.com/news/local_news/duke-energy-will-appeal-n-c-regulators-coal-ash-disposal/article_b91dfdac-4a2b-52a6-9bd9-2c19cdc5f79b.html (April 2019); <https://www.utilitydive.com/news/tva-votes-to-retire-paradise-bull-run-coal-units-despite-trump-tweet/548519/> (February 2019); <http://www.tennessean.com/story/opinion/2017/05/22/time-tva-state-regulators-step-up/101480930/> (May 22, 2017).

⁵ See, e.g., <https://www.southernenvironment.org/news-and-press/press-releases/drinking-water-supplies-for-over-2-million-people-in-tennessee-at-risk-unde>; <https://www.southernenvironment.org/news-and-press/news-feed/selc-challenges-tva-plan-that-risks-polluting-memphis-drinking-water-source>; https://www.southernenvironment.org/uploads/words_docs/TVAServiceArea_and_CoalPlants_and_DWIntakes_2016_0630_final.pdf.

definition of commercial use request, which is a request from a person “who seeks information for a use or purpose that furthers his/her commercial, trade, or profit interests.” 40 C.F.R. § 2.107(b)(1). As noted above, SELC is a 501(c)(3) non-profit organization dedicated to protecting the environment of the Southeast.⁶ It does not have commercial, trade, or profit interests in seeking these disclosures. The second factor for the commercial interest determination is the “primary interest in disclosure,” which indicates that fee waivers should be granted when “the public interest standard is satisfied and that public interest is greater in magnitude than that of any identified commercial interest in disclosure.” 40 C.F.R. § 2.107(l)(3)(ii). As SELC does not have any commercial interest in these disclosures, the public interest is clearly greater in magnitude.

Given SELC’s role in disseminating information regarding power companies and EPA, disclosure of the requested materials will clearly benefit the general public through increased knowledge about EPA’s understanding of the regulatory environment. The requested disclosures are likely to significantly contribute to public understand of government operations, and are not primarily in the requester’s commercial interest. This request therefore meets the two requirements for a fee waiver, and so a fee waiver should be granted.

FOIA requires a responding agency to make a “determination” on any request within twenty (20) working days of receipt. *See* 5 U.S.C. § 552(a)(6)(A)(i). The statute favors disclosure of records and instructs the agency to withhold information only in narrowly defined circumstances in which the agency can articulate a reasonably foreseeable harm protected by an exemption. *See id.* at § 522(a)(8)(A)(i). FOIA also requires the release of all reasonably segregable portions of a document that are themselves not exempt. *See id.* at § 552(b). Should EPA refuse to provide the information requested, EPA must inform SELC of the grounds for its refusal and the specific administrative appeal rights which are available. *See id.* at § 552(a)(6)(A)(i). SELC further requests preparation of a *Vaughn* index to facilitate evaluation of the completeness of EPA’s response. *See Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973) (index should include a detailed justification for claims of exemption, as well as specificity, separation, and indexing of documents).

Should our request for reduced or waived fees be denied, we are prepared to bear the reasonable duplication and search costs necessary to fulfill this request. However, I request you contact me before processing this request if the fee is expected to be in excess of \$100.00. SELC reserves our right to appeal a fee waiver or reduction denial. If you have any questions regarding this request, please feel free to contact me at 615-921-9470 or cbowling@selctn.org. I appreciate your prompt attention to this matter and look forward to receiving the public records requested.

Sincerely,

Chelsea Bowling
Tennessee Bar Applicant

⁶ *See* <https://www.southernenvironment.org/about-selc>.